IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NORTHWESTERN STEAMSHIP COMPANY, LIMITED, Petitioner,
Appellant,

vs.

C. RANSOM, JOHN HANNAFIN, A. ARTAL, GUST ANDERSON, ERIK JOHNSON, SAM ATKINSON, WILLIAM LUNDBERG, J. L. PORTER, TOM BERG, JACOB OSTERHOLM, J. L. SAGE, JOHN BORLAND, J. R. MORELAND, LOUIS MARTIN, MATT MATTSON, WILLIAM R. PIERCE, H. A. BROADED, P. McCORMICK, CHAS. KELLY, FRANK HANNIGAN, ROASLIE PAPES, T. VANDENENK, F. C. AVERY, A. O. JOHNSON, JOHN SULLIVAN, J. ABOHDEN, EMIL LINDQUIST, FRANK SMITH, HADE ROARK, G. W. BELL, ROBAK POWELL, PAT REDMOND and EMIL STANK,
Appellees.

No. 1732

In the Matter of the Petition of THE NORTHWESTERN STEAMSHIP COMPANY, LIMITED (a Corporation), Owner of the Steamer "SANTA CLARA," an American Vessel, for Limitation of Liability.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant

W. H. BOGLE,
CHARLES P. SPOONER,
IRA A. CAMPBELL,
Proctors for Appellant.

323-4 Colman Bldg.,
Seattle, Washington.

The Ivy Press, Second and Cherry, Seattle

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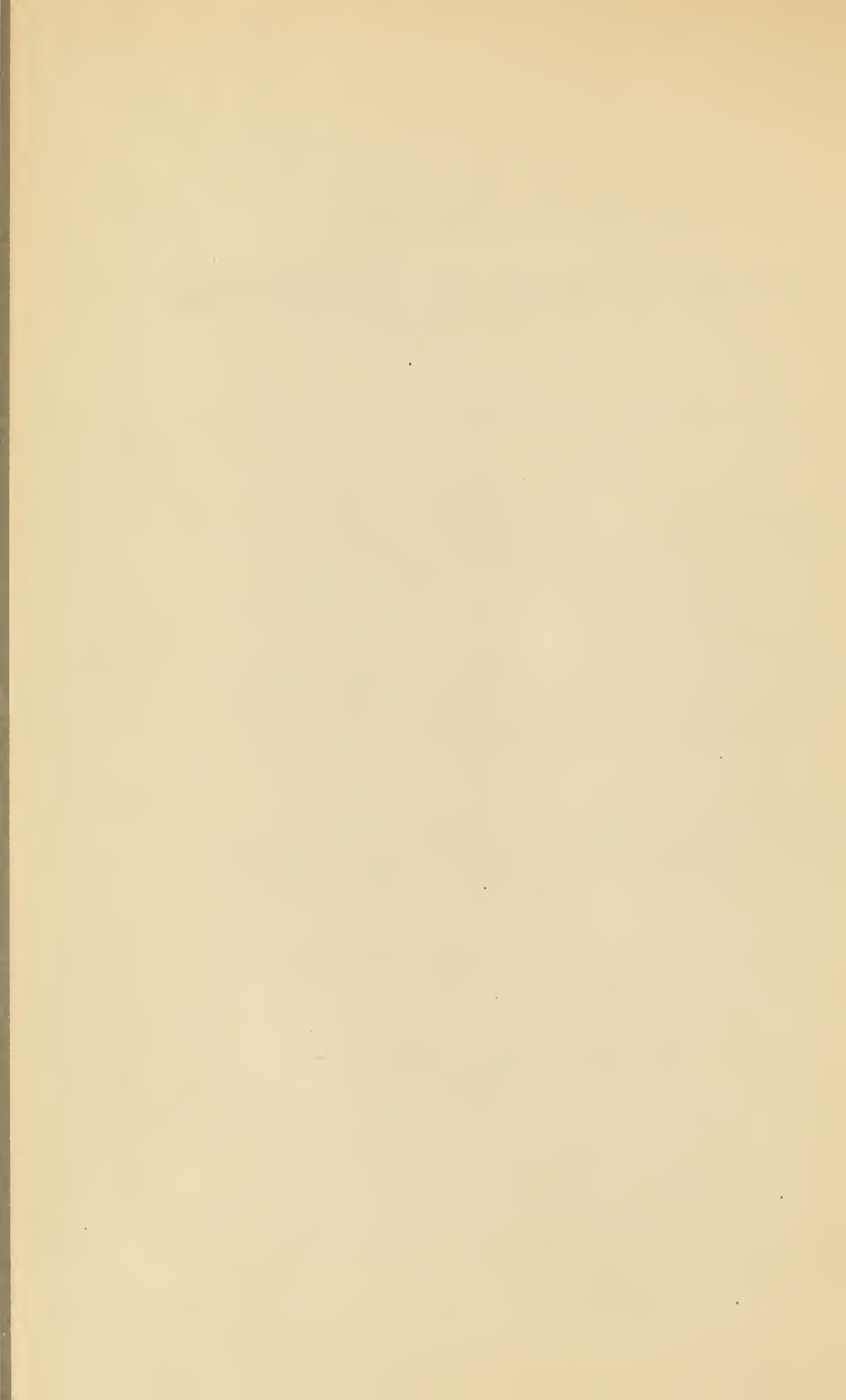

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE NORTHWESTERN STEAMSHIP COMPANY, LIMITED, Petitioner, *Appellant,* vs. C. RANSOM, JOHN HANNAFIN, A. ARTAL, GUST ANDERSON, ERIK JOHNSON, SAM ATKINSON, WILLIAM LUNDBERG, J. L. PORTER, TOM BERG, JACOB OSTERHOLM, J. L. SAGE, JOHN BORLAND, J. R. MORELAND, LOUIS MARTIN, MATT MATTSON, WILLIAM R. PIERCE, H. A. BROADED, P. McCORMICK, CHAS. KELLY, FRANK HANNIGAN, ROASLIE PAPES, T. VANDENENK, F. C. AVERY, A. O. JOHNSON, JOHN SULLIVAN, J. ABOHDEN, EMIL LINDQUIST, FRANK SMITH, HADE ROARK, G. W. BELL, ROBAK POWELL, PAT REDMOND and EMIL STANK, *Appellees.*	No. 1732

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Brief of Appellant

STATEMENT OF CASE.

The steamer "Santa Clara," an American vessel, owned by The Northwestern Steamship Company, Limited, a corporation, appellant herein, left Uyak, Alaska, on October 6, 1906, on a voyage to

Seattle. (p. 201.) As shown by her certificate of inspection (Petitioner's Exhibit "H") she was an ocean passenger steamer of 1588 gross tons, and was licensed to carry 123 first-cabin and 237 deck or steerage passengers. After leaving Uyak, the steamer touched at intermediate points and at Seward and Valdez (pp. 8, 224, 295), where other passengers boarded her (pp. 204-5). From Valdez she started on the outside passage, but changed and came inside by way of Juneau (p. 209). On the trip to Seattle she had on board a total of 353 passengers, of which number 230 were steerage (p. 201; Claimant's Exhibit "I," pp. 395-401). The steamer reached Seattle on October 21, 1906, and thereafter, during the months of March and April, 1907, some twenty-five persons claiming to have been passengers on said steamer on said voyage, commenced separate actions against appellant in the Superior Court of the State of Washington for King County, claiming damages in the sum of $500 each for injuries received and suffering endured on the voyage (pp. 8-9), in one of which actions (wherein Sam Atkinson was plaintiff) a verdict was rendered and judgment entered for $300. (p. 10.)

Thereafter on March 6, 1908, appellant filed in the United States District Court for the Western

District of Washington, Northern Division, in Admiralty, its petition for limitation of liability (pp. 7-15). Thereupon proctors for appellant gave notice to said Sam Atkinson and those who had filed said actions in said Superior Court, through William Martin and Julius L. Baldwin, their attorneys, that they would, on the 9th day of March, 1908, apply for an order appointing three appraisers and causing due appraisement to be had of said steamer "Santa Clara" and her freight pending, and for a further order restraining the further prosecution of all actions then pending in said Superior Court arising out of claims for failure to properly transport passengers on said steamer "Santa Clara" from ports in Alaska to Seattle in the month of October, 1906. (p. 17.) On said 9th day of March, 1908, said William Martin (proctor for appellees), on behalf of all of the appellees, except Messrs. Porter, Berg, Martin, Hannigan, Papes, Abohden, Bell and Powell, filed objections to the jurisdiction of said court, and a motion to quash (pp. 18-24), which objections and motion were overruled (p. 25), and an order was entered on March 11, 1908, restraining further prosecution of all of said actions which had been commenced and were then pending in said Superior Court (pp. 25-29). The court entered an order

appointing three appraisers, ordering and directing them, after being duly sworn, to make due appraisement of the value of the steamer "Santa Clara" and her freight pending at the termination of her voyage leaving Uyak, Alaska, on October 6, 1906, and arriving at Seattle, Washington, on October 21, 1906. (pp. 29-30.) Notice of said appraisement was given said parties who had commenced said actions in said Superior Court, through William Martin and Julius L. Baldwin, their attorneys (p. 13), and thereafter on March 14, 1908, said appraisers, after having made and subscribed to an oath before the clerk of said United States District Court, made due appraisement of said steamer and her freight pending in accordance with said order, and thereafter, on March 16, 1908, filed in said United States District Court, their appraisement, under oath, wherein they appraised said steamer "Santa Clara" at $60,000 and her freight pending at $15,774.15. (pp. 32-35.)

On motion of appellant, pursuant to notice to the aforesaid claimants (pp. 37-8), the court, on March 19, 1908, entered an order approving said appraisement, and directed the petitioner to file a stipulation, with surety, for the payment into said court of the amount of said appraised value of said steamer and her freight pending, or any portion thereof,

whenever the same should be ordered (pp. 38-9). Thereupon said petitioner filed said stipulation with said court (pp. 35-6). Notice of motion for issuance of monition was given said claimants on March 20, 1908 (pp. 41-2), and pursuant thereto and the prayer of the petition, the court, on March 23, 1908, entered an order directing that a monition issue, and be served and posted and published as in said order provided, against all persons claiming damages or injury arising out of said voyage, and citing them to appear before the 29th day of June, 1908, and make due proof of their claims (pp. 44-6). Said monition was duly issued under hand and seal of said court, and, on the 24th day of March, 1908, was served upon William Martin, attorney for said parties who had commenced said actions in said Superior Court (pp. 47-9), and was duly posted and published as in said order provided (pp. 49, 58-61). On the 23rd day of March, 1908, pursuant to motion and notice thereof (pp. 40-1), the court entered an order appointing W. D. Totten a commissioner, before whom all claims should be presented, and directed that proof of said claims and the contest thereof be made before said commissioner as prescribed by the rules and practice of said court, and granting petitioner the right to contest its liability for all or any of said claims inde-

pendently of the limitation of liability claimed, to which order said Sam Atkinson and the other parties to said actions in said Superior Court excepted (pp. 50-2). On March 9, 1908, the court entered an order allowing said Sam Atkinson and the other parties to said actions in the Superior Court to interpose a joint answer (pp. 24-5), and on March 20, 1908, said William Martin served on petitioner a purported joint answer on behalf of certain claimants, now appellees, which answer was verified by William Lundberg, one of said claimants, and was thereafter, on October 26, 1908, filed with the clerk of said United States District Court (pp. 66-70). The petitioner served on William Martin, attorney for said claimants, and said commissioner, and filed with the clerk of said United States District Court, on July 3, 1908, its objections to the allowance of said claims (pp. 55-58). Thereafter, on July 13, 1908, the court entered an interlocutory decree, ordering, adjudging and decreeing that all persons other than appellees, claiming damages or injuries arising out of the voyage of the steamer "Santa Clara" leaving Uyak, Alaska, on the 6th day of October, 1906, and arriving at Seattle, Washington, on the 21st day of October, 1906, be forever barred from presenting any claim or claims in said or any other court for any damages or injuries

arising out of or occurring upon the aforesaid voyage of said steamer (pp. 62-5).

Thereafter proofs of claims for the following claimants, in support of their respective claims, were made before said commissioner, W. D. Totten, viz: F. C. Avery, Hade Roark, Emil Stank, A. O. Johnson, Patrick Redmond and William Lundberg; and proofs were made by said petitioner in support of its petition and its objections to the claims of said claimants, all of which proofs were, on October 26, 1908, returned and filed by said commissioner with said court (p. 74). Thereupon respective proctors were heard in argument, and the court, on March 27, 1909, rendered its memorandum decision on the merits, and thereafter, on April 21, 1909, entered its decree awarding each of said claimants the sum of $300, and taxed costs in the sum of $742.75 against the petitioner (pp. 335-9). On April 12, 1909, said court entered an order requiring the petitioner to pay into the registry of the court a sum sufficient to pay the allowance made to each of the claimants, with their costs (pp. 334-5). From said decree this appeal is prosecuted.

In its petition for limitation of liability, appellant set forth that it was the owner and operator of

the steamer "Santa Clara" during its voyage leaving Uyak, Alaska, on October 6, 1906, and terminating at Seattle, Washington, on October 21, 1906; that upon leaving Uyak it had on board a large quantity of freight and a large number of passengers, and thereafter took on board other passengers at the ports of Seward and Valdez and other ports; that thereafter some twenty-five persons claiming to have been passengers on said voyage had commenced separate actions in the Superior Court of Washington for King County, claiming damages in the sum of $500 each (in one of which actions judgment for $300 and costs was rendered), alleging: the failure on the part of appellant to provide suitable berths and accommodations; that the quarters were in a damp, cold and unclean and unsanitary condition; that a large number of the passengers were Chinese and Japanese fishermen, quartered in the steerage, and that the steamer was overcrowded and carried a larger number of passengers than allowed by law; that the steamer was insufficiently provisioned, and that the food furnished was prepared and served in an unclean, dirty and slovenly manner, and was unwholesome and unfit for consumption.

Said petition further alleged that the total amount of damages for which suits had been brought

was the sum of $12,500, and that if liability existed on the part of petitioner it believed that other actions upon other claims, exceeding the value of said steamer and her freight pending at the termination of said voyage might be brought; that the freight pending was the sum of $15,774.15.

Said petition further alleged that the petitioner did not admit any liability for said alleged damages, and that it desired to contest the same, and claimed exemption under Secs. 4283 to 4285 U. S. Rev. Statutes, on the grounds and for the reasons that said steamer was at all times seaworthy, and well and sufficiently supplied with good, wholesome food and that the same was served at all times during said voyage in clean, well-cooked condition and in quantity sufficient for all the passengers on said steamer; that all of said passengers on said steamer had good, clean berths, except a small number from the port of Valdes, who took passage upon said steamship well knowing that all of the berths were taken and that if they did not desire to go their passage money would be refunded, and well knowing that if they did go they would have to take, and agreed to accept, such accommodations as could be given them; and that for such of said passengers as did not have regular berths equal or better accommodations were furnished them

in the smoking-room, saloon and social halls of said steamer; that the sleeping, dining and other quarters on said steamer were well ventilated and were at all times on said voyage kept in a clean and sanitary condition; that said steamer did not have passengers in excess of the number allowed by her certificate of inspection, and that if said alleged damage was done the same was done, occasioned, or incurred without the privity or knowledge of the petitioner (pp. 7-15).

That in said purported joint answer, appellees, by William Martin, their proctor, alleged as a basis of their claims, in addition to the grounds set forth in said actions in said Superior Court, as appeared in paragraph II of said petition, that at the time of the commencement of said voyage, to-wit: on or about the 6th day of October, 1906, referred to in the petition herein, said steamship "Santa Clara" was unseaworthy, and left said ports of Uyak and Valdes, Alaska, in an unseaworthy condition in the following respects: That said steamship "Santa Clara," on leaving on said voyage from Uyak and Valdes, Alaska, for Seattle, Washington, did not carry a sufficient supply of provisions on board for said voyage for the number of passengers carried on said voyage and vessel, and did not carry any emergency

supply of provisions whatsoever upon said voyage; and that the boilers of said vessel were leaky, weak and defective and unfit to go to sea, and that the hull of said vessel was leaky and taking water, and it was necessary to keep the pumps going on said voyage; and that by reason of the defective conditions of the boilers of said vessel and the want of provisions on board it was necessary for said vessel to put into Juneau, Alaska, to be reprovisioned on said voyage, and to take what is known as the inside passage on account of the condition of said vessel; and that on account thereof said vessel did not arrive in Seattle, Washington, until on or about the 20th day of October; and that the usual time for said voyage was about four to five days; and that, by reason of the facts alleged in paragraph five of the petition and this answer each of these claimants suffered hunger, cold, anxiety and fear upon said voyage and great discomforts from not being provided with a suitable place to sleep; and alleged that they were not provided with any place to sleep on the whole of said voyage, and when they arrived at Seattle were weak, sick and sore from said suffering, cold and hunger, and were damaged in the full sum of $500.00 each in the premises, and for which damages said claimants asked that they be allowed and

awarded judgment in the full sum of $500.00 each, except the claim of Sam Atkinson, for which an allowance was asked of the judgment of $300 and costs entered in said action in said Superior Court.

Said answer further asked that each of said claimants have judgment against the petitioner in the sum of $500.00 and against the stipulation filed herein for the payment of the same on the limiting of the liability of said vessel, and that said stipulators be decreed to pay said amount with the costs incurred in the Superior Court of the State of Washington for King County and the costs and disbursements herein; and that each of said claimants have such other and further relief as might seem just and proper (pp. 66-70).

The objections of petitioner to the claims of said claimants (appellees) reiterated that portion of the petition, paragraph VIII, setting forth the grounds and reasons for which exemption was claimed, and denied the allegations of claimants' joint answer, except that portion alleging the commencement of the actions in the Superior Court, which was admitted. (pp. 71-73.)

The court, in its memorandum decision, found: That the appraised value of the steamer "Santa

Clara" was more than sufficient to cover all known claims, so that it was unnecessary to discuss the question whether appellant was entitled to exemption from liability in excess of that amount;

That charges were made that the steamer was unseaworthy, and not supplied with sufficient provisions, nor equipped to carry comfortably and safely the number of passengers received for the voyage, all of which the court considered disproved by a fair preponderance of the evidence, except in one particular, viz: the vessel did not have berths or places to sleep for the number of steerage passengers on board;

That he believed petitioner's contention that notice was given to those who came on board at Valdes that there were no berths and that they could go to the company's office and get their money back, was an after-thought—at any rate, inconsistent with the fact the additional passengers were received and carried;

That the ship was overcrowded, and that for the discomfort suffered by the steerage passengers the petitioner was liable;

That the court could not determine that the food was as bad as to constitute a breach of contract;

That the steerage passengers suffered discomfort from the filthy and bad condition of the steerage quarters;

That the fishermen and soldiers filled all the space available for the accommodation of steerage passengers, and that the fishermen were filthy and offensive in their manners, and the Europeans especially so, being intoxicated and turbulent;

That the voyage was rough and there was a great deal of seasickness;

That the court did not consider the sum of $300 exorbitant compensation for physical suffering caused by a breach of a passenger contract (pp. 322-4).

A decree for the sum of $300 and interest at 6% from its date was entered in favor of each of said claimants, appellees. (pp. 335-339.)

Costs were taxed in the sum of $742.45. (pp. 343-4.)

Upon the entry of the decree appellant duly appealed to this court, filed its assignments of error, and it claims that the decree is erroneous in the particulars hereinafter set forth, and relies upon the following specifications of error in the decree (pp. 349-359):

SPECIFICATIONS OF ERROR.

I.

The District Court erred in holding that appellant's steamer did not have accommodations for all passengers received previous to touching at Valdez, for the evidence shows to the contrary. (Assignments of Error 1, pp. 349, 202-222-4, 243-6, 274, 281, 296.)

II.

The District Court erred in holding that appellant did not notify those who came on board its steamer at Valdez that there were no berths untaken, and that they could secure a refund of their passage money at the company's office, for the reason that it is entirely contrary to the evidence. (Assignment of Error 2, pp. 349, 323, 204-205, 224-5, 282-3, 296-7, 300-1, 306.)

III.

The District Court erred in holding that the evidence of notice by appellant to all persons who came on board at Valdez that no berths remained untaken and a refund of their passage could be obtained at the company's office, was an afterthought and not proved by a fair preponderance of the evidence and

inconsistent with the fact additional passengers were taken, for it is contrary to the evidence. (Assignment of Error 3, pp. 349-350, 323, 204-205, 224-5, 282-3, 296-7, 300-1, 306.)

IV.

The District Court erred in holding that the ship was overcrowded and that the steerage passengers were not provided for, for the evidence shows that she did not carry passengers in excess of the number allowed by law and that sufficient accommodations were furnished. (Assignments of Error 4, 9, 10, 17; pp. 350-1, 205, 207-8, 216, 224-227, 261-2, 265-6, 272, 282, 284-5, 292, 297.)

V.

The District Court erred in holding that the steerage passengers suffered any discomfort and that the ship was liable therefor, for the evidence shows that they were given all the privileges of the ship, and that the ship was maintained as clean and orderly as was possible considering the conduct of the passengers. (Assignments of Error 5, 6, 7, 8, 11, 12, 13, 14; pp. 350-1, 100-2, 111-12, 133, 134-5, 138, 187-8, 191, 205, 206-7-8, 216, 221, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 297, 298.)

VI.

The District Court erred in holding that claimants (appellees) suffered any damage, for the evidence shows that none of them suffered any physical injury or damage. (Assignments of Error 15, 16, 18, 19, 20, 21; pp. 351, 75, 108-9, 124, 144, 145-6, 161-2, 166, 173-4, 175, 187, 194.)

VII.

The District Court erred in not holding that claimants (appellees) had not filed in said proceedings any proper claims as required by the Admiralty Rules of the U. S. Supreme Court and of the U. S. District Court for the Western District of Washington. (Assignment of Error 22; pp. 47-9, 50-1, 66-70, 77.)

VIII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, C. Ransom, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error, 23, 15, 16, 17, 18, 19, 20, 21,

61, pp. 352, 47-9, 50-1, 66-70, 77, 204, 215, 221, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

IX.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellant, John Hannafin, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 24, 15, 16, 17, 18, 19, 20, 21, 61, pp. 352, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

X.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, A. Artal, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. Assignments of Error 25, 15, 16, 17, 18, 19, 20,

21, 61, pp. 352, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XI.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Gust Anderson, in the sum of $300 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 26, 15, 16, 17, 18, 19, 20, 21, 61, pp. 352, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Erik Johnson, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 27, 15, 16, 17, 18, 19, 20, 21, 61, pp. 351, 353, 359, 47-9, 50-1, 66-70, 77.) For additional references to record, see Specification VIII.

XIII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, J. L. Porter, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 30, 15, 16, 17, 18, 19, 20, 21, 61, pp. 351, 353, 359, 47-9, 50-1, 66-70, 77.) For additional references to record, see Specification VIII.

XIV.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Tom Berg, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 31, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 353, 359, 47-9, 50-1, 66-70, 77.) For additional references to record, see Specification VIII.

XV.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Jacob Osterholm, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damages or that his contract of carriage was broken. (Assignments of Error 32, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 353, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XVI.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, J. L. Sage, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 33, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 354, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XVII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Louis Martin, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 34, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 354, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XVIII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, J. R. Moreland, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 35, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 354, 359, 47-9, 50-1, 66-70. 77.) For additional references to record, see Specification VIII.

XIX.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Louis Martin, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 36, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 354, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XX.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Matt Mattson, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 37, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 354, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXI.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, William R. Pierce, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 38, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 355, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, H. A. Broaded, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error, 39, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 355, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXIII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, P. McCormick, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 40, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 355, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXIV.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Chas. Kelley, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 41, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 355, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXV.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Frank Hannigan, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 42, 15, 16, 17, 18 ,19, 20 ,21, 61; pp. 351, 355, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXVI.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Roaslie Papes, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 43, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 355. 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXVII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, T. Vandenenk, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 44, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 356, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXVIII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, John Sullivan, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 47, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 356, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXIX.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, J. A. Abohden, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 48, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 356, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXX.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Emil Lindquist, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 49, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 357, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXXI.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Frank Smith, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 50, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 357, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXXII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, G. W. Bell, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 52, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 357, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXXIII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Robak Powell, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and did not testify, and there is no evidence showing that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 53, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 357, 359, 47-9, 50-1, 66-70, 77.) For additional references to record see Specification VIII.

XXXIV.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, F. C. Avery, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and the evidence does not show that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 45, 15, 16, 17, 18, 19, 20, 21, 61; p. 351, 357, 359, 47-9, 50-1, 66-70, 77, 100-2, 108-9 110-1, 112, 114, 204-8, 209, 216, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

XXXV.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Hade Roark, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and the evidence does not show that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 51, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 357, 359, 47-9, 50-1, 66-70, 77, 124, 133-5, 137-8, 204-8, 209, 216, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

XXXVI.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, William Lundberg, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and the evidence does not show that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 29, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 353, 359, 47-9, 50-1, 66-70, 77, 191, 194, 195, 204-8, 209, 216, 224-7, 233-6, 241-2, 247-250, 259, 265,

269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

XXXVII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, A. O. Johnson, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and the evidence does not show that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 46, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 356, 359, 47-9, 50-1, 66-70, 77, 149, 151, 156, 160, 161-2, 166, 204-8, 209, 216, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

XXXVIII.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Pat Redmond, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and the evidence does not show that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 54, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 358, 359, 47-9, 50-1, 66-70, 77, 173-4, 182, 187-8,

204-8, 209, 216, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

XXXIX.

The District Court erred in rendering and entering judgment and decree against appellant and its stipulator in favor of appellee, Emil Stank, in the sum of $300.00 and costs and interest, for the reason that he filed no proper claim and the evidence does not show that he suffered any injury or damage or that his contract of carriage was broken. (Assignments of Error 55, 15, 16, 17, 18, 19, 20, 21, 61; pp. 351, 358, 359, 47-9, 50-1, 66-70, 77, 144, 145-6, 204-8, 209, 216, 219, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

XL.

The District Court erred in taxing costs against appellant, and entering judgment and decree thereon, for the reason that the evidence does not show appellees to have suffered any injury or damage or that their contracts of carriage were broken, entitling them to judgment against appellant. (Assignment of Error 57; pp. 358, 335, 343, 75, 108-9, 124, 144, 145-6, 161-2, 166, 173-4, 175, 187, 194.)

XLI.

The District Court erred in taxing the sum of $10.00 docket fee as costs against appellant, and in entering judgment and decree thereon, for the reason that the evidence does not show appellees to have suffered any injury or damage or that their contract of carriage was broken, entitling them to judgment against appellant; nor did appellees, except Messrs. Avery, Roark, Stank, A. O. Johnson, Redmond and Lundberg, appear in said proceeding and make any proof of their alleged claims. (Assignments of Error 58; pp. 358, 335, 343, 75, 108-9, 124, 144, 145-6, 161-2, 166, 173-4, 175, 187, 194.)

XLII.

The District Court erred in taxing as costs against appellant the sum of $100.00 costs for filing 25 complaints by appellees in the Superior Court of the State of Washington for King County, for the reason that the evidence does not show appellees to have suffered any injury or damage, or that their contracts were broken, entitling them to judgment against appellant. (Assignment of Error 59; pp. 359, 335, 343, 75, 100-2, 108-9, 124, 133, 134-5, 138, 144, 145-6, 161-2, 166, 173-4, 175, 187-8, 191, 194, 204-5-6-7-8, 216, 221, 224-7, 233-6, 241-2, 247-250, 259, 265, 269-270, 272, 281-3, 284-5, 286-7, 292-3, 296-7, 298, 300-1, 306.)

ARGUMENT.

I.

Assignment of Error 1, Specification 1, goes to the question of the sufficiency of accommodations for all passengers received prior to the vessel reaching Valdez. Of the six claimants who testified all but Redmond and Lundberg took passage at Valdez, the latter two boarding the steamer at Seward. The former says that he looked over the berths and they were all filled in, but did not say anything to the officers on the vessel until they left Valdes, as "he didn't get a chance." (170.) The latter said that he asked for a berth when he went aboard; "he guessed it was some of the officers, he couldn't remember" until it was suggested to him by one of proctor's leading questions (190).

As against such testimony are the positive statements of the officers in charge. The purser says that there were sufficient berths for all steerage passengers taking passage at Seward (202), and Mr. McKevitt, the steerage steward, says that two or three getting on at Seward complained that they had no berths, and that he secured berths for all who so com-

plained (222-3). According to the custom the steerage passengers selected their own berths (222). He knew of no one not having a berth from Seward (223). The chief steward also states that there were sufficient berths for all Seward passengers (281), as does also the captain (296).

We respectfully submit that a fair preponderance of the evidence shows that there were sufficient accommodations for all taking passage prior to Valdez, and that the testimony of one who didn't ask for a berth and of another who couldn't remember whom he did ask, ought not to justify a finding that the accommodations were insufficient at that time.

II.

Assignments of Error 2 and 3, Specifications 2 and 3, may be properly considered together, as they both touch the question of notice given the steerage passengers from Valdez. The District Court, in its memorandum decision, said:

"A claim is made that the vessel had accommodations for all the passengers received previous to touching at Valdez and that all those who came on board at that place were notified that no berths remained untaken and that they could go to the company's office and take back the money paid for their tickets. *This, I believe, is an afterthought;* at any

rate, it has not been proved by a fair preponderance of the evidence and is inconsistent with the fact that additional passengers were received and carried."

Four steerage passengers who took passage at Valdez, Avery, Roark, Stank and Johnson, said that *they did not receive any such notice.* On the other hand, the purser, chief steward and steerage steward said the notice was given. The purser (204-5) says that he personally went around among the passengers on board the ship, together with the chief steward and the steerage steward advising all Valdez passengers who had embarked that they didn't have sufficient accommodations for them, and to return to the company's office and they would be refunded the amount of their ticket (204-5). The steerage steward testified that the purser gave him orders to so notify those getting on at Valdez, and that he personally gave such notice (224-5). The chief steward said that the quartermaster had orders not to let any more aboard, but that the passengers jumped over the rail, and after the quartermaster found they were aboard he, the chief steward, with the purser and the waiters, went through the steerage and all over the ship and told the passengers if any of them hadn't berths now was the time to get ashore and have their money refunded to them (282). The master testi-

fied that he gave the purser orders to give the notice in question (300-1, 306).

The court said that it believed this to be an *after-thought.* In other words, that a year and a half afterwards these four men appeared in court and stultified themselves by swearing to a falsehood. Is such a conclusion justified? Has it any basis in the record? It must not be forgotten that the testimony of all the witnesses was taken before a commissioner and was returned by him into court in typewritten form, and that the District Court at no time saw any of the witnesses and had no opportunity to observe their demeanor on the stand. The court had before it nothing more than appears before this court, and we are at a loss to understand what there is in the record to justify a conclusion that such testimony, such defense, was an afterthought. On the one hand the court had four witnesses who had material interests in their cases—seeking damages—for the very condition the notice was given to avoid; on the other hand were four officers of the steamer who had no interest. It might be true that the four claimants did not hear the notice given, but does that prove it was not given? Where are all the other witnesses proctor claims to represent? Is it reasonable to say, because four out of all the passengers did not hear

the notice given, that it was not given, when four equally as reputable men, so far as the record discloses, say that they personally gave it? How can the court say that four testified falsely and four truly, when it did not see or hear the witnesses? The four officers whose testimony is so challenged did not attempt to deny that all steerage berths were filled on reaching Valdez, and in that respect the court admits they told the truth. Wherein is there anything in the record that would account for a motive or incentive to such falsehood? We have failed to find it.

The giving of such notice was not inconsistent with the fact that the passengers were received and carried. Why, on the contrary, that is the very condition with which it is consistent! If they did not desire to go they could get their money refunded. Was there any reason for their not staying? The record shows the four claimants to have been working men desirous of getting out of Alaska, and yet the fact was that there was no other ship coming down for a month or more, the Portland and Santa Ana both having gone on the rocks (225, 274). Under these circumstances it was not unnatural that the men should express, as they said, their determination to go anyway (205, 225, 283, 301).

We cannot but feel that the District Court erred in finding that the notice in question was not given or proved by a fair preponderance of the evidence, and most grievously erred in finding the evidence of it to be an afterthought.

III.

Assignments of Error 4, 9, 10, 17, Specification of Error 4, go to the error of the District Court relating to overcrowding. It appears from the testimony of the purser (201) and from the record of appellant (Exhibit I, pp. 395-401), that the "Santa Clara" had on board, when she left on her downward voyage, 353 passengers, of whom 230 were steerage. Her certificate of inspection (Exhibit H) permitted her to carry 360 passengers, of whom 237 were to be deck or steerage passengers. It is conclusive, therefore, that she was within her licensed number and was not acting in violation of the law.

Three hundred and fifty-three are admittedly a large number of people when gathered together in one body, but except as respects the berthing of the six persons who appeared in this proceeding and testified to having secured no berths, there is no evidence that the ship was overcrowded in the sense that

should hold appellant liable in law. The U. S. steamboat inspectors are the officials of government who have immediate control of the licensing of passenger vessels, and they are presumptively qualified to pass judgment on the carrying capacity of the vessels under their control, and having given their official consent to a limit of 360 passengers, it cannot be said that the vessel was acting in violation of law when she received and carried a lesser number.

Proctors for claimants filed herein an "answer" sworn to by one person, without a showing of any kind that either such claimant or proctors were authorized to complain in behalf of the entire thirty-three. And of the thirty-three, but six appeared and testified in support of any claim. These six claimed to have had no berths, and except for that one deficiency, there is no evidence of any overcrowding of the steamer. As appears from the record, these men, while traveling as steerage, were given unusual privileges—practically those of first-class passengers, the full run of the ship, including the use of first-class toilets, social hall, saloon, smoking room and all deck space (100-1, 109, 111, 134-5, 187-8, 207, 226-7, 272, 284-5, 297). The question before this court is one of damages, among other things, for overcrowding of the vessel, and yet the testimony of the six, as has

been pointed out, shows that the privileges aforementioned were enjoyed by each of them. It is further significant that before the steamer sailed they knew of the conditions and voluntarily took passage with knowledge of the approximate number on board. Mr. Avery testified that he found all berths full on boarding the ship (96); Roach was aboard for an hour before the ship sailed (128-9); Stank said that he walked all over and could see no empty berths (147); Johnson said the berths were all filled with men or baggage in the afternoon before sailing (160); Lundberg felt it necessary to ask for a berth when he went aboard at Seward (190).

So that aside from the question of liability for not furnishing the six berths, it is apparent that the six men took passage with full knowledge of the passengers aboard. Of the knowledge of the remaining twenty-six, the record discloses nothing. With this fact and the further one that the steamer was within her licensed number, there is no ground for complaint in that particular. These men were laboring men anxious to get out of Alaska, and they embraced the only immediate opportunity, for the record shows that there was no other ship coming down for a considerable period, as both the Portland and the Santa Ana had been disabled (225).

We, therefore, respectfully submit that the court erred.

IV.

Assignments of Error 5, 6, 7, 8, 11, 12, 13, 14, Specification of Errors, are properly considered together, for they all concern the alleged discomfort of the steerage passengers from the condition of the steerage quarters and conduct of the passengers. It is to be admitted that the record shows great contradiction in several particulars. In one respect, however, the testimony of the six claimants and of the officers and of the crew are largely in accord—that of the personal conduct of many of the steerage passengers.

A considerable number of the steerage passengers were fishermen (European, Chinese and Japanese) who boarded the steamer at Uyak. As appears from Exhibit "G" (229-232), the forward steerage was divided into two compartments by a bulkhead running fore and aft from the after end of the steerage to the hatch at the forward end. The Chinese and Japanese were quartered on the port side, and the white passengers on the starboard. There is no law, of which appellant is aware, which makes it unlawful to thus carry Orientals and Caucasians in

the same steerage. No complaint is made of the Chinese, except their presence, and their passing through the other part of the steerage. Great effort was made by proctors for claimants to magnify the "awfulness" of thus quartering Orientals and Caucasians together, but it is not to be forgotten that those passengers were received on board at Uyak prior to the time that any of the claimants took passage, and when the latter boarded the steamer they did so with full knowledge of that fact. This being true, there is no legitimate ground of complaint in that respect.

The Chinese and Japanese did not interfere with the white passengers or their quarters, except that in making their tea in the kitchen they passed along the aisle between the bunks on the starboard side (232, 290), and across the hatch in going to the closet (88). They were fed entirely separate (211). There is no evidence that the Orientals did not conduct themselves with proper deportment.

But as much cannot be said of the white men. At the time the steamer left Seward many of them came aboard in a drunken, quarreling condition, making it impossible for the officers to control them (221, 248, 281), and this continued on the way down (247).

The principal ground of complaint, however, goes to the condition of the steerage. The six claimants who testified maintained that the floor of the steerage was filthy and unclean from vomit and the overflow of the toilet, and that the ventilation was bad. In their efforts to emphasize this, they claimed that nothing was done to remedy the condition until the day before the arrival of the steamer in port, but it appears that these men were on deck the greater part of the day and admit that they knew nothing of what was done in their absence. Mr. Avery admitted that he could not positively testify that no effort was made while he was absent (112); Roark said that he could not say whether they were cleaned or not while he was on deck (137).

It is admitted by all witnesses that the voyage from Seward until the inside passage was reached was rough and a great many of the steerage passengers were seasick, with the natural results that usually follow that condition (110-1, 114, 144, 149, 152, 164, 171, 197). As against their testimony are the positive statements of the officers that all possible was done to maintain the steerage in as clean and orderly a condition as possible. Mr. McKevitt, the steerage steward, testified that the effect of the sea after leaving Valdez was to cause vomiting and sea-

sickness (233, 248-9), and that he cleaned the steerage several times a day, every possible time that he saw it (234-5, 239); that they washed the deck down with the hose (236); that they strapped small skits about the steerage, some of which were used by the passengers and some would make no attempt to do so (233, 248-9). Mr. Dillon, the chief steward, substantiated this by saying that they experienced a rough sea from Seward to Valdez (282), and that the steerage passengers vomited on the deck wherever it was convenient for them (285). He, too, said that the steerage was constantly cleaned and washed down with the hose by the sailors, and that the steerage steward, a man of 25 years' experience, kept it in good shape (286-7). The master also testified that they had very rough weather, and that many on board were seasick, and that while they had rough weather the steerage was nasty, for the men would lie in their berths and vomit on the deck (248-9); that everything possible was done to keep it clean; it was swept and mopped, and after they got into better weather everything was washed out (298-9). In this the officers were corroborated by a passenger, Holland, who frequently passed through the steerage. He saw the men cleaning it, and often they used the hose (270-1).

That the weather was bad and the sea rough until they got into the inside passage, is not to be denied, and under those conditions, it is not unreasonable to believe that many of the passengers were sick. They were not helpless women or irresponsible children, but laboring men from Alaska, capable of observing some rule of decency and helping themselves. But on the contrary they responded to the demands of nausea with utter disregard to their fellow passengers or the steamer or its employees. The latter all say that they did everything they could to keep it clean, and if it was not done to the entire satisfaction of a passenger seeking damages, it would not be surprising. But strange is it not, if reasonable effort was not made by the crew to keep the steerage clean, that some of the 230 passengers, other than the six who testified, did not appear and corroborate the complaint. Human endeavor has its limits, and even though all was done by the steerage crew that could be done, doubtless any man who was looking for damages, could portray a condition resulting from nausea that would be sickening in its details. None of the witnesses seemed to have suffered greatly on its account. Mr. Johnson said that he felt pretty sick from the time he left Valdez until he reached Juneau, and from then on, in the smoother water, he was better

(161-2). So with Stank, it was during the rough weather that he was ill, and coming down from Juneau he was better (145-6).

Complaint was also made of the ventilation. All admit that the air in the steerage was due to the condition of weather the steamer was experiencing. In the day time the tarpaulin was off the hatch, but the wind came down and it was cold, and after midnight the crew put it on (143-4). It was impossible to open the ports because the spray from the sea came in, but at times it was cool enough (173). The testimony of Mr. McKevitt was that the steerage was ventilated by the hatchway and ventilator forward, and by opening the port lights, but that owing to the sea, this could not be done until the inside passage was reached. Here again was a condition over which the crew had no control and yet they did the best that they could under conditions that prevailed. So with the dog, about which so much was said. The mate would take it up on deck (242) and some one else would bring him back (243, 138-9). And is it reasonable that any human being would do as Roark testified to on page 133, wherein he says that the dog was sick, and his refuse left on the deck, and yet he slept within four feet of it? Is it possible that such a man could suffer from it?

The toilet was undoubtedly clogged and may have overflowed. This was due to an empty salmon can stolen from the cargo, being thrown in it. Mr. McKevitt went over the side to get the can out. The toilet constantly had running water in it, and was at no time shut off, except while the can was being removed. (241-2.) The six claimants suffered no inconvenience from this, for as has been previously pointed out, they had the free run of the ship and used the first-class toilets.

A review of the testimony cannot help but impress anyone with the fact that a great amount of seasickness, with its nauseating effects, prevailed while the steamer was making the outside passage, a condition that no one but the person himself could prevent, and that every reasonable effort was made by the crew to maintain the steerage in as clean a condition as was possible. Is it reasonable to believe that because these six witnesses, who admitted they remained on deck except when actually sleeping below, did not see the steerage cleaned, it was in fact not cleaned? Is it reasonable to believe that the officers of the steamer who lived and worked aboard the ship would allow such condition to exist without attempting to remedy it? The officers are all reputable men,

some of them confined in their employment to caring for the steerage, and are they to be believed in their statements of what they personally did and caused to be done, or is the court to find them falsifying, and that a man who was willing to admit what Roark did (133) was the truth sayer? We cannot believe so. The record establishes that all reasonable diligence was used to care for the steerage, and no more the law requires. A carrier by water is not an insurer of its passengers.

We respectfully submit that the court erred in the particulars set forth in the assignments and specifications.

V.

Appellant assigns as error the holding of the District Court that claimants suffered damage, for the reason that the evidence shows that none of them suffered any physical injury or damage. (Assignments of Error 15, 16, 18, 19, 20, 21, Specification of Error 6.)

Damages suffered are necessary as a basis for an award such as the District Court made in this case, but, as appellant views the evidence, there is a complete failure of any such showing.

Mr. Avery testified that "he had rheumatism as a result of his experience on the voyage; that it was a month after he returned to Seattle before he felt like doing anything, but that at no time did he consult a physician; in fact, didn't think it was necessary, and made no attempt to get any work." (208-9.) This is the sum total of his evidence as to damages suffered. He had been earning in Alaska $75 a month.

Mr. Roark testified that "he didn't feel very good all the way down, but that he didn't feel so bad either, to speak of." And, in response to Proctor's further query, he said that "he was not feeling very good when he got off; was worn out from sleep and something to eat, you might say, and that his stomach was out of whack from some reason or other" (124). Does that show a personal damage entitling him to an award of $300.00? Is there a word in it showing that he was the victim of any privation or damage? If so, we fall short of a proper comprehension of the basis of damage the law requires. It is to be noted that the court did not find the food improper or insufficient and no appeal was taken therefrom.

Mr. Stank was "pretty nearly always sick until Juneau was reached, and then was better" (144-6). This, the court will re-call, was during the voyage

from Valdez to Juneau, during which the rough weather and sea was encountered, and during which period a good many of the passengers were seasick. There can be no denial that his case was one of plain seasickness, and yet the District Court made no distinction and also awarded him the $300.00. We are at a loss to believe that appellant is liable for the seasickness of its passengers, or that Mr. Stank has made any showing tending to justify the award made to him.

Mr. Johnson also "felt pretty sick from the time he left Valdez until he reached Juneau, and from then on, in the smooth water, he felt better" (161-2). This, again, shows on its face that it was but seasickness, and the fact that "he got three or four meals off the boat at Juneau and then felt better," does not establish a case of suffering or damage justifying the award made him. As to his health on arrival at Seattle, he was pretty shaky (156). Isn't that the result of seasickness? We fail to find in his testimony any injury or damage for which the District Court could hold appellant liable. His principal trouble seems to have been from "nausea of the sea," couldn't eat the food, and yet the District Court did not find the food other than the law required to be furnished steerage passengers. A significant fact

appears in connection with his ailment, and that is that he did not have with him any blankets, as admittedly was required of all steerage passengers. Surely one boarding a steamer without the bedding required, who thereby necessarily contemplated sleeping in his clothes, and who was seasick in the course of the rough weather, does not present a case justifying the award made him.

Mr. Redmond testified:

Q. Did you suffer any on that trip from loss of sleep?

A. I did suffer quite a lot (173).

Q. Describe it as well as you can to the commissioner?

A. On account of not being able to sleep on the hatches because these Chinamen were gambling all the time and the hatch would be full of them, both the Chinamen and the Japs would be gambling all the time and the hatch was full of them and it was all right there on the one hatch.

And then he added, "of course you could sleep all the next day for that matter" (173-4).

Proctor was not satisfied, so immediately asked him:

Q. Now, I don't think you described your suffering from loss of sleep and hunger. Now go ahead and describe it as far as you can?

A. Well, I can't describe it any better than that. I had to sleep on the hatch and you know what a man has to suffer; you have to use your own blankets and have everyone jumping over them and tearing them and throwing them around.

We submit that Proctor was right when he said that he had not described any suffering, nor did he do so. Is there a word of complaint as to his condition on arrival at destination? We fail to find it in the record. Surely such testimony can not in the eye of the law constitute a basis of damage, let alone the award made.

And lastly, Mr. Lundberg:

Q. Did you suffer any from hunger?

A. Yes, I didn't get half enough to eat either of what was there.

Q. Did you suffer any ill effects from eating what they did have?

(Objected to as leading.)

A. Yes. I got sick alright.

And that is all there is in his testimony as to any ill effects of the voyage. Not a word as to his condition upon arrival at Seattle. It is to be noted that his evidence relates solely to the food, which was not condemned by the District Court, and which question is not before this court.

In the face of such testimony what did the District Court do? Those six men were the only ones who testified, and the foregoing is the only evidence of special damage. Upon such testimony, the court entered a judgment in favor of all 33 of the alleged claimants, holding appellant liable in the sum of $9,900.00 and $742.75 in costs. We respectfully submit that such evidence speaks for itself, and most emphatically cannot constitute a basis of special damage, either in favor of the men who testified, or for those who have never appeared and whom the court has never seen. In effect it places a premium upon such claims as these, for there is hardly a vessel entering port from northern waters, from which many of the passengers subject to seasickness could not make equally as good a showing, so far as any special damage is concerned.

We, therefore, respectfully submit that the court erred as assigned.

VI.

The seventh specification, Assignment of Error 22, goes to the question of the sufficiency of the claims.

In its monition, the court commanded all claimants to appear before the court and make due proof

of their claims before the commissioner (47-9). In the order of reference, the court directed that proof of the claims should be made before said commissioner as prescribed by rules and practice of the court (50-1). In attempted compliance therewith, an answer was filed, signed by William Martin, proctor for claimants, and verified by William Lundberg. In the opening of the answer appears the names of thirty-three persons (66), but in no other place in the record is any other appearance or claim for the parties to be found. It is true that the court entered an order permitting a joint answer (24), but such answer in no respect complies with the rules of the District Court, which prescribe the method of proceedure in limitation of liability proceedings.

Rule 58 provides: "Proof of claims presented to the commissioner shall be made by or before the return day of the monition by *affidavit* specifying the nature, grounds and amounts thereof, the particular dates on which the same accrued, and what, if any, credits were given thereon, etc. * * * Any claim so objected to must be established by further prima facie proof on notice to the objecting party as in ordinary cases. * * *"

Rule 54 of the Supreme Court prescribes that "the court shall issue a monition against all persons claiming damages * * *, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ. * * *"

Rule 56 provides: "* * * and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner *under oath,* shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said Act of Congress, or both."

There was no compliance with these rules. No proof of claim in form of affidavit was made. The only pretense of the claim was the joint answer signed by proctor and verified by Lundberg. Rule 58 of the District Court contemplates and provides that each person having a claim shall present it in the form of an affidavit,—in other words, that he shall *personally make oath* to his claim, not through the medium of some other party, who may or may not be so authorized. And having made such showing, if it is objected to, then he must go further and establish it by prima facie proof. As to any of the twenty-six claimants, who did not appear, is there a word of proof showing them to have been damaged in such manner or amount as to have a claim against appellant? Other than the appearance of the names of thirty-three different parties at the beginning of the answer, there is not a word in the entire record showing that they suffered any damage, or even that proctor was authorized to represent them. As well might

he have written in the name of every one of the 353 passengers and claimed that a sufficient proof of claim, as to maintain that there is any appearance or authority in the record for the twenty-six who have not otherwise appeared. Appellant has yet to see any of them or see the authority by which proctor was authorized to appear for them in this proceeding.

The claim of Atkinson is, of course, established by his judgment in the Superior Court.

The rules of the Supreme Court contemplate that the claim shall be under the solemnity of an oath, for rule 56 provides that any who have prescribed a claim to the commissioner *under oath,* may contest the proceeding. The rules were made to prescribe a method of orderly procedure, which has been cast aside with utter disregard by proctor in this proceeding. Wherein, in this case, have any of the "twenty-six" subscribed to an oath alleging that they suffered any injuries or damages on the voyage in question? If the rules are to have any force or effect, the so-called claimants are without standing in court.

We respectfully submit that the District Court erred.

VII.

Under this division we shall discuss Specifications of Error 8 to 33, inclusive, for they all go to the question of the error of the District Court in rendering and entering judgment and decree against appellant and its stipulator in favor of the appellees who did not appear and testify in the proceeding. As far as what we shall say at this time it is equally applicable to all.

As has been pointed out in our previous discussion, the only appearance, if indeed it can be called an appearance, in this proceeding of any of the twenty-six appellees mentioned in the Specifications 8 to 33, was by the insertion of their names in the so-called joint answer (75). Mr. Martin signed the answer as their proctor, and it was verified by William Lundberg, who afterwards appeared and testified in his own behalf. In no other manner have such appellees come into this proceeding. They have failed to testify in their own behalf and except for the allegations in the joint answer, which admittedly is not proof, there is not a word in the record showing or tending to show that these men were without berths and proper accommodations, or that they suffered any ill effects from the voyage.

Appellant's witnesses testified that no berths remained untaken when the steamer reached Valdez, and that notice was given those boarding the vessel at that point of such condition and that a refund of their passage money could be secured if they did not desire to go under the conditions existing. All knowledge of such notice was denied by those who testified. If they had possessed such knowledge, certainly the court would listen to no complaint upon that ground, and yet how could the District Court, upon the testimony of the six, who did not even attempt to testify in behalf of others than themselves, say that such notice was not given the twenty-six who have not appeared, and that they did not take passage with full knowledge of the condition aboard? If they did so, there was no breach of their contract of carriage in that respect, and no liability would rest upon appellant therefor.

The same may be said of those who boarded the steamer at Seward. So far as the record discloses, they may have taken passage with full knowledge of the presence of the fishermen and Orientals, and of the large number aboard, and thereby precluded any complaint on their part. In the absence of proof that they had no such knowledge, is it to be presumed that appellant is in any event liable? Such is not the con-

templation of the rules in this proceeding, for rule 58 of the District Court provides that upon objection to any claim, it must be established by further legal prima facie proof on notice to the objecting party as in ordinary cases. Proof of their claims, upon objection, was required, and yet none of the six witnesses pretended to testify on behalf of the twenty-six who did not appear. Except for Redmond (181), it does not appear that any of the six even knew them. And the testimony of Lundberg, who swore to the answer, does not even disclose that he knew any of the twenty-six, or of the treatment they received.

The evidence adduced on behalf of appellant shows that unusual privileges were given all the steerage passengers—the right to go everywhere and use the first-class accommodations, and that some of those who had no berths were given permission to, and did, sleep in the saloon and social hall on the cushions (284). In the absence of their testimony to the contrary, can this court say that the "twenty-six" did not enjoy those privileges, and that they were not as good, if not better, accommodations than a canvas bottom standee in the steerage? Such is the effect of the District Court's decision. In the absence of any evidence tending to show that the

"twenty-six" who did not appear, suffered by reason of any act of appellant, or its employees, how can the judgment of the District Court be justified? In the absence of any proof of special damage, a mere breach of the contract of carriage, as will later appear, would only entitle them to a refund of their passage money, and yet what did the District Court do? Penalized appellant in twelve times the amount of fare paid.

We, therefore, respectfully submit that the District Court erred, as assigned, in entering judgment for $300 and costs in favor of each of the appellees who have not testified in the proceeding. This does not refer to the claim of Mr. Atkinson, the amount of whose claim has been determined, unless reversed on appeal.

If the District Court was in any way justified in considering on behalf of the twenty-six who did not appear, the testimony of the six claimants who have testified, appellant still feels that the judgment was erroneous. In that respect what we shall say under Specifications 34, 35, 36, 37, 38 and 39 applies with equal force to the twenty-six who did not testify.

VIII.

Appellant has assigned as errors the entering of judgment and decree against appellant and its stipulator in the sum of $300 and costs in favor of each of the appellees, Avery, Roark, Lundberg, Johnson, Redmond and Stank, all of whom testified in the proceedings before the commissioner. Specifications of Error 34, 35, 36, 37, 38 and 39 may be, therefore, very properly considered together.

The District Court in its memorandum decision (322) found that the charges made in their pleadings by appellees were disproved by a fair preponderance of the evidence, except in one particular, viz., the vessel did not have berths nor places for the number of steerage passengers received on board. In its finding of failure of proof in that respect, the Court dismissed all evidence of the "notice of no berths," which the officers of the steamer claimed to have given at Valdez, as an afterthought. Whether the Court was so justified in finding, we have previously considered, and it needs no reiteration here. The Court also found the ship overcrowded, and not maintained in a condition of cleanliness, all of which we have discussed. We have also pointed out to this Court the entire want of any showing of special dam-

age on the part of any of the appellees who appeared and testified, their cases of illness being largely attacks of seasickness, with its nauseating results. The Court found that the charges of unseaworthiness and insufficient provisions were disproved by a fair preponderance of the evidence (322). It did find, however, that the contract of carriage was broken, and that it did not consider the sum of $300 exorbitant compensation for physical suffering caused by such breach. The fare paid by each of the appellees was $25.00, so that the effect of the decision was to penalize appellant in twelve times the amount of fare paid. As has been pointed out, it is nothing more or less than a penalty for there is not a word of evidence in the whole record showing a special damage in that amount to have been suffered. Avery felt indisposed for a month; Roark "didn't feel so bad after all, when he came to think of it"; Stank was seasick until Juneau was reached; Johnson had the same ailment; Redmond couldn't describe any suffering; and Lundberg claimed his sickness was from eating, as he said: "Yes, sir, I got sick all right." Surely such testimony cannot be defended as a foundation for special damage, and in its absence, the amount of the judgment is without warrant of law.

In *De Colange vs. The Chateau Margaux,* 37 Fed. 157, where the contract of carriage was broken by deviation of the steamer, but no special damage was

shown, Judge Brown, of the Southern District of New York, awarded a refund of the passage money.

In *The Willamette Valley,* 71 Fed. 712, the severest penalty, in proportion to the amount of passage money paid, in all the American cases we have been able to find, was imposed. There the purser refused to honor a first class ticket purchased from a broker, and demanded of the passenger first class fare. This, the latter refused to pay, and offered to purchase a steerage ticket, which was refused by the purser,—with the result that the passenger was obliged to pass the night and part of the day without food or bed, in an exposed part of the steamer, in cold and foggy weather. The court awarded him $300 damages, justifying it on the ground that the libellant was subjected to annoyance, and some public humiliation, with great discomfort, but had suffered no serious physical injury. But, as we say, the decision in its drastic force is not in accord with the weight of authority, in the absence of a showing of special damage.

In *Defrier vs. The Nicaragua,* 81 Fed. 745, the Court awarded $50.00 to each of the libellants as damages for breach of their contract of carriage.

In *The D. C. Murray,* 89 Fed. 503, where passengers on a sailing vessel were so ill treated and poorly

fed that they left the vessel at Honolulu, on a voyage from San Francisco to Sydney, the Court awarded them $100.00 each. A fare of $125.00 had been paid.

In *The President,* 92 Fed. 673, 677, where there was a failure to remain at Unalaklik, Alaska, a sufficient length of time to allow passengers from St. Michael to land, Judge De Haven held that there was a breach of the contract of carriage and upon the question of damages, the recovery must be limited to the actual loss sustained by the libellants in consequence of the breach.

A question of breach of contract of carriage for failure to furnish proper and sufficient provisions was considered by the Circuit Court of Appeals for the Fifth Circuit in *The European,* 120 Fed. 776. In that case the master of The European carried a number of muleteers from Durban, South Africa, to New Orleans. Suit was brought for breach of contract, libellants alleging insufficient accommodations and improper food. The District Court awarded them $15 each, but this was increased to $45 by the Appellate Court. The award was based upon the Federal statute (Sec. 4 of the Passenger Act of 1882, 22 Stat. 188, U. S. Comp. St. 1901, p. 2935), which provides a penalty of $3.00 per day for failure on

the part of the steamship to provide the passengers with provisions prescribed. The fare paid was $55 for each passenger.

By this statute, the Federal government has regulated the accommodations and provisions to be furnished by passenger steamships engaged in foreign trade. The same statute, in Sec. 2, imposes a penalty of $5.00 for each passenger carried for failure to provide the accommodations prescribed. While the statute does not apply to vessels engaged in the coastwise trade, it stands, by analogy, as an authority for the amount of penalty which should be imposed upon coasting vessels failing to provide sufficient accommodations to its steerage passengers, in the absence of any showing of special damage. It was in this respect that the District Court found the contract of carriage broken in the case at bar. In view of such statutory authority, has the award of twelve times the passage money any defense in law or justice?

A somewhat similar case to that at bar came before this Court on appeal from this District in the case of *Pacific Steam Whaling Co. vs. Grismore et al.* (*The Valencia*), 117 Fed. 68. In that case complaint was made of an overcrowding of the steamship, the

failure to furnish second-class quarters and wholesome and properly cooked food. In addition, on arrival at Nome, the steamship landed the passengers on the beach, but withheld from them for a considerable period their baggage, tools and supplies, and from some of them goods and merchandise for the transportation of which charges had been paid. Special damages were proved by some of the passengers and for these a larger award was made, but for those who made no such showing judgment for $75 and interest was entered. The case contained not only the elements of personal discomfort that are charged in the case at bar, but extra expenses, losses of baggage and freight, and consequential losses on account of delay in delivering the baggage and freight. In its effect upon the passengers, the misconduct of that steamship was more severe and resulted in a real personal damage not to be found in the case at bar. And yet the Court did not make its award twelve times the fare paid.

The best known of all cases similar in their character to the case at bar, was that of *"The Oregon,"* before this Court, and reported in 133 Fed. 609. That case had all the elements of a breach of contract of carriage alleged in the case now before the Court, and many additional. Not only was a con-

dition of uncleanliness found to exist aboard, but the ship was unseaworthy (though this was not considered a breach in that particular case), and broke down at sea, causing great mental suffering and anguish. She was insufficiently provisioned, and the food was not served in a palatable condition, with the result of a real suffering on the part of the passengers. So extreme was the case that this Court felt justified in saying, page 624:

> "The testimony relating to the lack of wholesome food on the voyage is shocking in the extreme; and, making allowance for exaggeration, it still remains unequaled by anything in the reports of ocean navigation of late years."

So injured did the passengers consider themselves that 350 out of 374 on board, joined in the action, and there was an abundance of testimony showing special damage and injury suffered. And in view of all these facts, the District Court entered and this Court affirmed, a judgment awarding the libellants damages in double the amount of fare paid.

Read that case and compare it in all its details with the record before this Court,—the entire absence here of any showing of special damage, the conflict in the testimony as to the cleanliness of the ship, the question as to whether the passengers came aboard

at Valdez knowing that there were no berths, the want of any evidence on behalf of 26 of the claimants, the unusual privileges given the steerage passengers, the rough weather and seasickness, and we fail to understand how the judgment of the District Court awarding damages in the sum of $300—twelve times the amount of fare paid—to each of the claimants, can be justified. It is contrary to all authority.

We, therefore, respectfully submit that the Court erred as assigned.

IX.

Specification of error 40, assignment of error 57, goes to the question of taxing of costs. It is sufficient to say that if the District Court erred in entering judgment on behalf of claimants, or any of them, it erred in taxing costs on their behalf, as well. What has already been said as to the error of the judgment and decree is equally applicable to this assignment of error. This does not affect, however, the taxing of Atkinson's costs.

X.

Appellant has assigned as error 58, specification 41, the taxation of $10.00 docket fee for each of the claimants. It is to be noted that but six of the 33 appeared and testified; 26 have made no appearance in the proceeding other than by the insertion of their names in the joint answer. Atkinson's claim, of course, is determined and the docket fee properly taxed in his favor. As respects the others, it is a matter of discretion with the Court, conditioned first upon an entry of judgment for damages. In any event, we cannot but feel that the Court went beyond a reasonable discretion and in that respect erred.

XI.

The District Court taxed as costs $4.00 for each of the complaints filed in the Superior Court by 25 of the claimants. It is manifest that if the claimants are not entitled to a decree, the costs are improperly taxed.

We, therefore, respectfully submit that the Court has erred as assigned, and pray that the decree, except as to Atkinson, may be reversed, and that the decree of this Court should be that claims of the re-

maining claimants be dismissed with costs; or, in the event that this Court finds the contract of carriage broken, that the judgment of the District Court be modified and reduced to a nominal amount, with costs.

Respectfully submitted,

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